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No. 03-1046

IN THE

Supreme Court of the United States

AT&T CORP.,

Petitioner,

v.

BOBBY GENE ALLEN, ET AL.,

Respondent,

On Petition for Writ of Certiorari to the Oklahoma Court of Civil Appeals

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission is the administrative agency of the MULTISTATE TAX COMPACT. *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. In addition, five States are sovereignty members and sixteen States are associate members.[2] The Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978).

Historically, the COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax systems.[3] The States' initial interest in forming the COMPACT was to safeguard state taxing power in the context of multistate commerce, an essential

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[1] No counsel for any party authored this brief in whole or in part. Only *Amicus* Multistate Tax Commission and its members States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state. Finally, this brief is filed pursuant to the consent of the parties, filed herewith.

[2] The COMPACT parties are Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The Sovereignty members are Florida, Kentucky, Louisiana, New Jersey and Wyoming. The Associate members are Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, West Virginia and Wisconsin.

[3] The Willis Committee, sanctioned by Part II of PUB. L. 86-272, 73 STAT. 555, 556 (1959), extensively studied how Congress might regulate State taxation of interstate commerce.

governmental power for States to fulfill their constitutional role. To this end, the Commission reviews state court decisions that impact state tax sovereignty to determine whether a given decision can have a perverse affect. The Oklahoma Court of Civil Appeals has issued such a decision, directly denying the sovereign interests of sister States.

The right of a State to require the exhaustion of administrative remedies as a condition to a waiver of its sovereign immunity from tax refunds suits in courts of general jurisdiction is a foundational aspect of state tax sovereignty. In addition, to enhance the efficient functioning of state tax systems, States have chosen to provide vendors—burdened with the obligation of collecting the government's tax—statutory protection from refund suits by the taxpayer-consumer. Tax systems work best when agencies can gain willing cooperation from those responsible to collect and pay over the tax. Protecting vendors from suits enhances that cooperation. Moreover, permitting tax disputes to be litigated in court actions between vendors and customers without participation of the tax agency defeats the purpose of establishing special tax administration procedures. The decision below impairs these legitimate State tax policies.

Oklahoma's certification of a class that includes nonresidents from States that forbid a court action of this kind raises issues of vital importance to States, and yet no State is party to the action. Your amicus represents the interest of States in asserting their tax sovereignty rights. Of the 27 other States affected by the class certification of the Oklahoma court, ten are full compact member States, three are sovereignty member States and ten are associate member States.

ARGUMENT

I

IN CERTIFYING THE PLAINTIFF CLASS, THE OKLAHOMA COURT VIOLATED THE DUE PROCESS AND FULL FAITH AND CREDIT CLAUSES BY OVERRIDING THE SOVEREIGN IMMUNITY OF SISTER STATES THAT BAR TAX REFUND SUITS UNLESS THEIR ADMINISTRATIVE REMEDIES ARE EXHAUSTED

A. Choice of Law Rules under the Due Process and Full Faith and Credit Clauses Require Oklahoma to follow the Law of the State of Nonresident Plaintiffs in Determining Jurisdiction for Purposes of Class Certification.

The Oklahoma trial court certified a plaintiff class that includes AT&T customers who lived outside city limits in 28 States but were charged municipal taxes. The court applied Oklahoma law to all plaintiffs, heedless of the fact that many nonresident plaintiffs with no contact with Oklahoma live in States that have asserted their statutory sovereign immunity to bar such suits.

Recent Supreme Court choice-of-law jurisprudence describes the constitutional limits on a forum's choice to apply its own law.

> [T]he Due Process Clause and the Full Faith and Credit Clause provided modest restrictions on the application of forum law. These restrictions required "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state in-

> terests, such that choice of its law is neither arbitrary nor fundamentally unfair."

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985), quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312 (1981).

Shutts was a Kansas class action involving residents of all 50 States seeking interest on delayed royalty payments from natural gas production in Kansas and 10 other States. Only a small percentage of the plaintiffs or the production was in Kansas. The Court ruled as a matter of constitutionally compelled choice of law that the Kansas court did not have sufficient contacts with nonresident class members owning properties outside Kansas to permit the Kansas court to apply substantive Kansas law setting interest rates. 872 U.S. at 822.

In *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), an interest-on-royalty case factually similar to *Shutts*, the Court held that it was permissible for Kansas to choose forum law to apply its five year statute of limitations to nonresident class members because the statue of limitations is procedural, not substantive. The Court acknowledged that the "substantive-procedural dichotomy in the context of the Full Faith and Credit Clause" functions simply "to *delimit spheres of state legislative competence*." *Id.* at 727 (emphasis added).

In its most recent choice-of-law decision, *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003), the Court affirmed that the Full Faith and Credit Clause did not compel Nevada to substitute the statutes of another State for its own statutes dealing with a subject matter concerning which Nevada was competent to legislate. Nevada's *competence to legislate* arose from the fact that the alleged tortious activity occurred in Nevada.

The crux of the *Shutts* holding has thus been reinforced by these two later cases. The forum in a multistate class ac-

tion cannot apply substantive forum law to nonresident class plaintiffs who have no connection with the forum State because the forum State *lacks competence to legislate substantive law* for those nonresidents.

Oklahoma is not competent to legislate about tax refunds for other States' residents on transactions occurring in those States. Under *Shutts*, *Wortman* and *Hyatt*, the due process and full faith and credit clauses require Oklahoma to apply the substantive law of the other States. A State has no more "substantive" provision of law than its statutory assertions of its sovereign immunity to specify tax administration remedies and to bar suits in court by taxpayers who have not exhausted those remedies. Oklahoma may not include plaintiffs from those States as part of the certified class.

B. Assertions of State Sovereign Immunity to Bar Taxpayers from Suing Vendors Regarding Tax Collections or from Bringing Court Actions for Tax Refunds Prior to Exhausting Administrative Remedies is Vital to Protect State Tax Policy.

Class plaintiffs are suing AT&T to obtain the return of erroneously collected municipal taxes as damages in an action for restitution and breach of contract. AT&T had duly paid the tax over to the tax agencies. The Oklahoma Court of Civil Appeals described the action as one that "concerns the validity of a municipal sales tax charge included in their monthly long distance bill." Appendix to Petition (App.) at 2a.

In their motion to certify the class, however, named plaintiffs argued that this is not a tax refund case implicating refund procedures. Even though AT&T wrongly collected a tax that was not owed and plaintiffs want that tax refunded, plaintiffs focus on AT&T's error. The trial court found, and the appellate court affirmed, that this was not a tax refund action under Oklahoma law. Plaintiffs' failure, therefore, to

exhaust the administrative tax proceedings did not deprive the trial court of subject matter jurisdiction.

Other States whose residents were certified as part of the class would treat this lawsuit as a tax refund action. States like New York, Texas, Pennsylvania, Florida, and others cited in the Petition at 18-21 require that any claim that implicates a tax refund must be brought against the State—not the business that collects and pays over the tax—and must be brought first to the administrative forum or special court established as a statutory condition for the waiver of sovereign immunity for any subsequent tax refund suit in a court of general jurisdiction.

States require exhaustion of administrative remedies and bar suits against vendors for a number of reasons. Of primary importance is the ability of States to safeguard their fisc. Taxes are the crucial lifeblood of any government. This Court, in a distinguished line of cases thoroughly rehearsed in the Petition at 12-14, has repeatedly affirmed the importance of state taxes as an essential element of state sovereignty and the firm policy against interference with state tax procedures.

Those procedures enhance administrative efficiency. Millions of refunds are sought annually. An administrative forum acts as a filtering mechanism to dispose of the great bulk of tax refunds, protecting the court system from needless litigation. These specialized administrative forums are familiar with the intricacies of tax laws and can bring well-developed expertise to bear on this complex and vital subject in an efficient and expeditious manner.

Using administrative refund procedures remains important even where consumers are complaining about a vendor's failure to figure the tax correctly—whether though inattention, unwillingness to fund the necessary resources, or even

outright fraud. For as long as plaintiffs are challenging "the validity of a municipal sales tax charge," as the Oklahoma court described the action here, and are seeking a refund, the State has a crucial interest in ensuring it tax agency is party to the dispute and normal tax remedies are followed to determine whether the tax was collected erroneously.

Insulating vendors from the burden of litigation over refunds furthers an efficient tax system. The States already impose on the vendor the burden of collecting and paying over the government's taxes. To better ensure their wholehearted cooperation, States have reasonably chosen to protect their vendor from being caught in the middle of disputes between consumers and the State over whether a tax is properly due.

The Oklahoma court did not "misconstrue" the laws of these other States.[4] It affirmatively acknowledged that precedent from several States would treat this action as a claim for a tax refund, would bar taxpayers from bringing suit against a vendor-collector rather than the tax agency, and would require exhaustion of administrative remedies prior to court action. "Some jurisdictions have addressed the alleged overcharge of sales tax by companies providing telephone service and held that administrative remedies must first be exhausted before judicial relief can be sought." App. at 4a-5a.

The Oklahoma court simply disregarded the policy interests and statutory mandates of these other States. Instead of excluding residents of those States from the certified plaintiff class or denying class certification due to a lack of common-

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[4] *See Wortman*, 486 U.S. at 730-31 ("To constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention.")

ality, the court denied any conflict of laws existed. It focused exclusively and narrowly on the similarity in state tax laws under which a city tax can never apply to residents or transactions outside city limits. App. at 11a and fn. 6. The court ignored altogether the larger and more important jurisdictional aspect of the tax laws of sister States that ensures the efficient running of their state tax systems and protects their fisc through required exhaustion of administrative remedies.

In affirming certification of a plaintiff class that includes residents of these other States, the Oklahoma court exceeded due process and full faith and credit limits on Oklahoma's competence to legislate for nonresident class members. It improperly disregarded the law of the other States, impairing their sovereign right to govern their own tax processes. This Court is the only shield available to these other States.

II

THIS COURT HAS JURISDICTION UNDER THE EXCEPTIONS TO FINALITY IN *COX BROADCASTING CO. V. COHN*, 420 U.S. 469 (1988), AND STANDARDS FOR APPEAL OF CLASS CERTIFICATION DECISIONS DEVELOPED UNDER FED. R. CIV. P. 23(f).

Since 1789 Congress has granted the Court jurisdiction to review state court litigation only after the highest state court had rendered a final judgment or decree. 28 U.S.C. 1257. In *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975), the Court collated into four categories various exceptions to that finality requirement. Jurisdiction to grant this interlocutory review is provided under three of the four categories.

"In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another . . . the out-

come of further proceedings [is] preordained." *Id.* at 479. As in *Mills v. Alabama*, 384 U.S. 214 (1966) (only defense to proscribed publication was First Amendment claim), the outcome here is preordained. AT&T has acknowledged charging municipal tax to customers living outside city limits. The Oklahoma court underlined the obvious point that municipality cannot tax transactions that occur outside the municipality. There is no question but the plaintiffs are entitled to a refund. The jurisdictional question implicated by the correct application of federal choice-of-law restraints under due process and full faith and credit—which requires Oklahoma to respect the exhaustion requirements of sister States—will persist regardless of sending the case back for trial.

Indeed, that persistence is the core of *Cox*'s second category "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. The Oklahoma court looked at the different laws of sister States and decided to ignore them. That decision has been affirmed by the Oklahoma Court of Civil Appeals and let stand by the Oklahoma Supreme Court. There is no basis to believe that the Oklahoma courts will suddenly change their minds about the law applicable to class certification. The error in class certification results entirely from faulty legal analysis, not a complex factual calculus. Because AT&T acknowledges the factual error in charging customers a tax it should not have, the outcome of future state court proceedings will not alter the need for this Court to decide this jurisdictional issue in the class certification.

Lastly, this case most clearly qualifies as an exception to the finality requirement under the fourth category "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action."

420 U.S. at 482-83.[5] *Shutts* compels Oklahoma to apply the law of sister States to nonresident class plaintiffs. The relevant cause of action under the law of sister States is a tax refund action. The statutory invocation of sister States' sovereign immunity to require protection for vendors and exhaustion of administrative remedies is preclusive of any further litigation on that relevant cause of action for residents of those States.

The Court in *Cox* cited *Construction Laborers v. Curry*, 371 U.S. 542 (1963), as an exemplar of the fourth category. In *Curry*, federal labor policy preempted state jurisdiction to hear a picketing case properly before the National Labor Relations Board. As the Court in *Cox* articulated, the interlocutory appeal in *Curry* was proper because

> the power of the state court to proceed in the face of the preemption claim was deemed an issue separable from the merits and ripe for review in this Court, particularly "when postponing review would seriously erode the national labor policy requiring the subject matter of respondent's cause to be heard by the Board, not by the state courts."

420 U.S. at 483, quoting *Curry*, 371 U.S. at 550. The same reasoning applies here. Federal policy safeguards the exclusivity of jurisdiction for State tax administrative proceedings. That policy derives from principles of federalism and comity under the Constitution and has been reinforced by Congress in the Tax Injunction Act and this Court in cases like *National Private Truck Council, Inc, v. Oklahoma Tax Commis-*

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[5] The third category in *Cox*, inapplicable here, concerns cases where the federal issue has been finally decided, but "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id* at 481

sion, 515 U.S. 582 (1995). To paraphrase *Curry*: "postponing review would seriously erode the national [federalism] policy requiring the subject matter of respondent's cause to be heard [in the other States' tax administrative forums], not by the [Oklahoma] state courts."

This case is also strikingly similar to another fourth category case cited in *Cox*. In *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), the banks asserted that "a special federal venue statute immunized them from suit in Travis County and they could be sued only in another county." 420 U.S. at 483. Here, required exhaustion of other States' tax administrative procedures immunize AT&T and tax agencies from suit in courts. The issue of other States' sovereignty, like the issue in *Langdeau*, may be "entertained as a 'separate and independent matter, anterior to the merits, not enmeshed in the factual and legal issues comprising the plaintiff' cause of action.'" 420 U.S. at 483-84, quoting *Langdeau*, 371 U.S. at 558.

Jurisdiction of this Court to review the Oklahoma court decision plainly fits within the exceptions to finality in *Cox*. Further persuasive reason to hear this case comes from developing standards for discretionary appeals from class certification decisions by federal district courts.

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Court granted certiorari and reviewed an interlocutory appeal of class certification. That action sought a global settlement of current and future asbestos related claims. The Court agreed that "because [resolution of class certification issues] here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first." *Id.* at 612. The Article III issues—standing, subject matter jurisdiction, and justiciability—were jurisdictional, and yet the Court dealt first with class certification.

Here, the jurisdictional issue—the lack of subject matter jurisdiction over tax issues arising in States that require exhaustion—coincides with the class certification issue and has long enjoyed the assiduous respect of this Court. Interlocutory review is similarly appropriate here.

The dissent in *Amchem* objected to the interlocutory resolution of the class certification issue because such "highly fact based, complex, and difficult matters [were] inappropriate for initial review before this Court." *Id.* at 630. No such potential obstacle exists here. The bar to class certification is neither complex nor fact-based. It derives from a straightforward analysis of the tax and sovereign immunity statutes of the other States. Named plaintiffs are obliged to present exactly that information to the court on their motion to certify the class. *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986).

A spate of recent opinions from U.S. Courts of Appeals[6] has developed standards for when an interlocutory appeal of a class certification is prudent under the newly-minted authority of FED. R. CIV. P. 23(f).[7] This building exegesis is

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[6] *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999); *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000); *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000); *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154 (3d Cir. 2001); *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138 (4th Cir. 2001); *In re Lorazepam & Clorazepate Antitrust Litigation*, 289 F.3d 98 (D.C. Cir. 2002).

[7] FED. R. CIV. P. 23(f) reads as follows: "A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."

pertinent to the Court's decision whether to grant certiorari. Indeed, several of the decisions quoted the Advisory Committee's comment that the standard for entertaining an appeal under Rule 23(f) is "akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." *Blair*, 181 F.3d at 833; *Prado-Steinman*, 221 F.3d at 1272.

The circuit courts have identified two basic categories where an interlocutory appeal is appropriate. First are the so-called "death-knell" situations where the certification decision will end the litigation either because a named plaintiff denied class certification has too little at stake to proceed, or a defendant facing a large certified class will be forced to settle. The second category focuses on the nature of the issues raised and suggests five factors that weigh toward appeal: (1) unsettled and fundamental issues of law relating to class actions; (2) issues likely to evade end-of-the-case review; (3) a class certification decision that is manifestly erroneous; (4) a case that involves the public interest or a governmental entity; or (5) when similar issues are arising in related actions. *Lorazepam*, 289 F.3d at 104-105. All five factors favor granting review here.

The Petition for Certiorari involves a fundamental and unsettled issue concerning the impact of federalism, state sovereignty, and state tax policy on class certification decisions. This Court has repeatedly affirmed that state tax systems are an essential attribute of state sovereignty and that noninterference in state tax administration procedures is critically important. The application of the constitutional choice-of-law ruling in *Shutts* implicates a fundamental assertion of state sovereign immunity with regard to state tax policy. This Court represents the only protection for States against Oklahoma's violation of these crucial sovereignty interests.

End-of-case review is inadequate to protect the interests of the States. Allowing Oklahoma to proceed with plaintiffs from States which reserve initial jurisdiction on tax matters exclusively to an administrative process would, itself, deny state sovereignty interests for the vindication of which review is sought. *See Helstoski v. Meanor*, 442 U.S. 500, 506-07 (1979) (Speech and Debate Clause); *Abney v. United States*, 431 U.S. 651, 662 (1977) (double jeopardy).

A number of courts have placed special weight on the third factor, suggesting "this factor should be viewed on a sliding scale. The stronger the showing of an abuse of discretion, the more this factor weighs in favor of interlocutory review."[8] Indeed, that view echoes this Court's response to the dissent's assertion in *Amchem* that the many complex issues counseled delay in reviewing class certification. "If certification issues were genuinely in doubt, however, the jurisdictional issues would loom larger." 521 U.S. at 613, n. 15.

Rarely does an avid appellant doubt a lower court's decision was manifestly erroneous. But the error below looms particular large here given the clarity of the choice-of-law standard laid down by this Court in *Shutts* and the blithe willingness of the Oklahoma Court of Civil Appeals to cite and ignore the laws of those sister States that require exhaustion of administrative remedies and bar suits against vendors. This manifest error alone justifies granting certiorari.

The fact and nature of the governmental interest implicated here, the fourth factor, completely escaped the Oklahoma courts. While Oklahoma may not regard this suit as

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[8] *Prado-Steiman*, 221 F.3d at 1274-75 & n. 10; *see also Lienhart*, 255 F.3d at 145-46; *Newton*, 259 F.3d at 165; *Lorazepam*, 289 F.3d at 105 ("the more questionable the district court's decision, the less the remaining four factors need weigh in.")

one against the sovereignty interests of the State, a number of her sister States do.

Finally, similar issues are arising in related actions. Recently, the Illinois Court of Appeals affirmed a class certification including residents of Illinois and 17 other States in an action against a telephone company for erroneously collecting municipal sales tax from residents outside city limits. *P.J.'s Concrete Pumping Service v. Nextel West*, No. 2-02-1219 (Ill. Ct. App. 2nd Div., Jan. 27, 2004). The Illinois court likewise ignored the choice-of-law rules that required it to consider the law of its sister States in certifying the class to include nonresident defendants with no aggregation of contacts with Illinois—law that bars exactly that kind of suit.

Review by this Court at this stage is not only fully within the Court's jurisdiction and within prudential criteria favoring early review of certain class certification decisions, but it offers the only source of protection for state sovereignty interests.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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